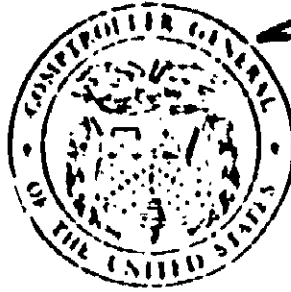


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## DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE:

B-203898

DATE:

February 16, 1982

MATTER OF:

Andero Construction Inc.

## DIGEST:

Record must reasonably indicate that copies of amendment were mailed in accordance with regulatory requirements if protester is to be charged with the risk of non-receipt of amendment. Agency compliance with regulation is not reasonably established where 3 of 4 bidders appear not to have received amendment in the mail.

Andero Construction Inc. protests any award to Lewis M. Merlo, Inc. under invitation for bids (IFB) DAKF01-81-B-0023 issued by the Presidio of California (Army) for replacement of street curbs and gutters. Merlo submitted the third highest of four bids received but was found to be in line for award when the two lower bids were rejected as nonresponsive. Andero complains that its second low bid would have been in line for award had it acknowledged receipt of Amendment 1 to the IFB, which modified the applicable wage rate determination. Andero denies that copies of the amendment, which it says neither it nor other potential bidders received, were ever mailed by the Army and alleges therefore that adequate competition was not obtained. We sustain the protest.

According to the Army, the protest should be denied because a bidder bears the risk of non-delivery of a solicitation amendment. The Army does not dispute Andero's statement that it did not receive the amendment, but says that at least one bidder (Merlo) received the amendment through the mail.

Andero concedes that the procuring activity is not an insurer of the delivery of bidding documents to prospective bidders who instead must bear the risk of non-receipt of solicitations and amendments. G & H Aircraft, B-189264, October 28, 1977, 77-2 CPD 329. However, Andero maintains that it should not also be expected to bear the risk of what it believes was a wholesale failure by the Army to mail copies of the amendment.

In this respect, there is no claim on the record before us that the contracting officer has any personal knowledge that copies of the amendment were prepared or mailed. No one (including the contract specialist who worked on this procurement) has come forward to indicate that he has any knowledge in this regard. The Army explains that the processing and mailing of amendments is done in bulk by clerical personnel, but has produced no routine business records indicating that those persons prepared or mailed copies of the amendment.

Andero does not view this as sufficient. Andero argues that the risk which a bidder assumes is limited to cases where the agency can establish that it first "complied with all regulations regarding timely mailing of the amendments." Andero notes that the Defense Acquisition Regulation (DAR) § 2-208 (1976 ed.) provides that, when an amendment is issued, it shall be sent to everyone to whom the IFB was originally sent.

The issue then, is whether or not it must be reasonably established that the amendments were in fact mailed, if a particular bidder is to be charged for the risk of non-receipt. We believe this is an implicit factor in our decisions dealing with this issue.

The underlying theory in our decisions which place the risk for the non-receipt of material amendments to a solicitation on the bidder is that the agency discharges its legal responsibility when it issues and dispatches an amendment in sufficient time to permit all bidders to consider the amendment in formulating their bids. CompuServe, B-192905, January 30, 1979, 79-1 CPD 63. For this reason, the fact that a particular bidder did not receive an amendment is not considered to be a sufficient basis to warrant resolicitation if adequate competition has been obtained and it has not been shown that there was a conscious and deliberate effort by the agency to exclude the bidder that did not receive the amendment. 52 Comp. Gen. 281 (1972). Thus, in 52 Comp. Gen., supra, we stated:

"\* \* \* While the Government should make reasonable efforts to see that interested bidders receive timely copies of the invitation for bids and amendments thereto, the fact that

there was a delay in a particular case where the provisions of ASPR [now DAR] 2-208 have been complied with, does not \* \* \* require the resolicitation of the procurement,\* \* \*

"\* \* \* [T]he propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices were obtained \* \* \*," (underscoring supplied)

In this respect, adequate competition may result when only a small number of responsive bids, or even one bid, is received, so long as the agency made the required effort to achieve competition. Reliable Elevator Corp., B-191061, April 27, 1978, 78-1 CPD 330.

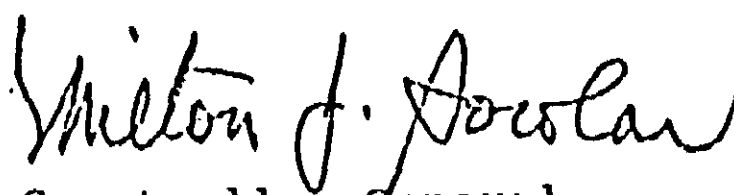
The record does not establish that the required effort was made here. That an agency complied with the regulatory requirements with respect to furnishing amendments to solicitations is usually evident from the number of bids or proposals received which did acknowledge the amendments, coupled with a statement from the agency which reasonably indicates that it did attempt to comply and that there was no deliberate effort to exclude a bidder or offeror from participating. See, e.g., CompuServe, supra (where five proposals were received and agency clerical personnel used the wrong zip code on the mailing to the protester).

Here the evidence falls short of that. The agency never affirmatively states that the amendments were mailed. While there is an affidavit in the record from the contract specialist, he states only his conclusion that "Merlo's acknowledgment of the amendment served as proof that it had been mailed out" and recites that he had not said he "had forgotten to mail out the amendment \* \* \*," The only evidence in the record indicating that any copies of the amendment might have been mailed is a one sentence statement submitted by the awardee, Merlo, after the protest had been filed, to the effect that it received the amendment through the mails. The one other copy known to have been received appears to have been picked up in person from the contract specialist. Moreover, the contracting officer states that the processing and mailing of amendments "is done in bulk by clerical personnel \* \* \*," so that it appears that the contract specialist is not in a position to indicate that the amendment was in fact mailed to those who should have received it.

Under these circumstances, where three of the four bidders who responded to the solicitation apparently did not receive mailed copies of the amendment and the agency, unlike in our prior cases, does not state that the amendments were mailed, we think this record is insufficient to establish that the agency complied with DAR § 2-208; we further think it is questionable whether adequate competition was obtained under these circumstances.

Accordingly, we recommend that the Army cancel the IFB and resolicit its requirement.

The protest is sustained.

*for*   
Comptroller General  
of the United States